Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 15, 1996

Mr. Pete Eckert
Cowles & Thompson, A P.C.
901 Main Street, Suite 4000
Dallas, Texas 75202.3793

OR96-1878

Dear Mr. Eckert:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 101225.

The city of The Colony (the "city"), which you represent, received a request for the employment records of Officer Billy Wilson. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108(b) of the Government Code.

Chapter 552 of the Government Code imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. *See* Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

You claim that the opinion in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) is a prior determination that excused the city from requesting a ruling from this office. We disagree. The holding in *Ellen* affects only sexual harassment investigations. Here, there are no allegations of sexual harassment. Therefore, the city cannot rely on *Ellen* as a previous determination.

The city also claims that the application of section 552.108(b) is compelling in this case. However, even assuming that section 552.108(b) can be compelling, where no criminal investigation or prosecution results from an internal police investigation of a

police officer's conduct, section 552.108 is inapplicable. *See Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied). We therefore conclude that, assuming section 552.108(b) is compelling, the city may not withhold the requested information based on section 552.108.

The other exception to disclosure originally claimed by the city is section 552.103. This office has previously held that section 552.103 does not constitute a compelling reason to overcome a presumption of openness. Open Records Decision No. 473 (1987). Therefore, the city may not withhold the requested information under this exception.

However, some of the information is protected by another statute, a compelling reason to withhold requested information. The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The documents submitted to this office include a medical record access to which is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. The medical record submitted to this office for review may only be released as provided by the MPA. We have marked that record for your convenience.

We note that there may also be other information that is protected from disclosure by statute. Criminal history record information ("CHRI") is generally confidential and not subject to disclosure. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Any such information is confidential and must not be disclosed. Please note, however, that driving record information is not confidential under chapter 411 of the Government Code, *see* Gov't Code § 411.082(2)(B), and must be disclosed.

Similarly, the provisions of section 552.117 are mandatory and therefore provide a compelling reason to withhold requested information. Section 552.117 of the Government Code excepts from public disclosure information relating to the home address, home telephone number, and social security number of a peace officer, as well as information revealing whether that officer has family members. This protection is automatic for peace officers. We have marked a sample of the types of information that must be withheld under section 552.117. The remainder of the submitted information may not be withheld under section 552.117.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses both common-law and constitutional privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

> information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov't Code § 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We have reviewed the submitted information and marked the information that must be withheld under common-law privacy.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

Stacy E. Sallee

Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 101225

Enclosures: Marked documents

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